CONTENTS

Index of Authorities i

Caption 1

Opinions Below 1

Jurisdiction 2

Question Presented 2

Treaty Involved 2

Statement of the Case 4

REASONS FOR GRANTING THE WRIT 7

Designation of Errors 8

Plaintiffs' Contentions 9

Article 9(b) Prohibits the Commencement of New Post-Treaty Diversions or Uses Until the Prescribed Finding or Agreement Has Been Made 9

It was so intended 11

The waters were allocated on the basis of existing uses 12

Article 9(b) was intended to protect existing uses 14

This intent is evident elsewhere in the treaty 16

Article 9(b) Is Valid 16

Some method of enforcing the allocation was necessary 17

The standard adopted was justified 19

Riparian rights to irrigation waters are not property protected by the due process clause of the Fourteenth Amendment 20

Water rights in navigable streams are not protected by the Fifth Amendment 21

An interstate compact may diminish a water right vested in the state's view 23

The Senate Resolution Did Not Alter the Meaning of Article 9(b) 23
The language is not so calculated 25
It was not so intended 26
Plaintiffs May Invoke Article 9(b) as a Rule of Decision 28
The protection of existing uses which will result from its enforcement was intended 28
Plaintiffs might invoke the provision even if it had not been specifically so intended 30
Conclusion 32
Certificate 32

APPENDICES

I. Text of treaty and protocol supplementary thereto, both effective November 8, 1945 1
II. Senate resolution advising ratification of treaty 41
III. Letter of transmittal of treaty from Secretary of State to President 46
IV. Excerpts from the transcript, hearings on treaty, Senate Foreign Relations Committee 51
V. Majority report of Committee, reporting treaty favorably 100
VI. Senate floor debate on ratification of treaty 110
VII. Opinion of Court of Appeals in this case 131

INDEX OF AUTHORITIES

CONSTITUTION, TREATIES AND ACTS OF CONGRESS

Constitution of the United States—Article I, Section 10 19

Treaty Between the United States and Mexico Relating to the Utilization of the Waters of the Lower Rio Grande, etc., Protocol Thereto and Senate Resolution of Advice and Consent Thereto, 56 Stat. 1219 (1945), Treaty Series 994 ..... Appendices I and II

Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), Treaty Series 207 22

United States Code—

Title 18, Sections 1651, 3058 20

Title 28, Sections 1251, 1350 20

Title 18, Section 1254(1) 2

62 Stats. 930 (1948) (28 U.S.C.A., 1331) 6

CASES

American Insurance Company v. Canter (1828) 1 Pet. (26 U.S.) 511 31

Antelope, The (1825) 10 Wheat. (23 U.S.) 66 13

Connecticut v. Massachusetts (1931) 282 U.S. 660 20

Cooper, In Re (1892) 143 U.S. 472 28

General Electric Co. v. Robertson (D. Md., 1927) 21 F. 2nd 214 28

Geofroy v. Riggs (1890) 133 U.S. 258 29

Gibson v. U. S. (1897) 166 U.S. 269 22

Haver v. Yaker (1869) 9 Wall. (76 U.S.) 32 28

Head Money Cases (1884) 112 U.S. 580 28

Hinderlider v. La Plata, etc. Co. (1938) 304 U.S. 92 23
Indemnity Insurance Co. v. Pan American Airways
(S. D. N. Y., 1944) 58 F. Supp. 338 28
McCauley v. Makak Indian Tribes (1942) 128 F. 2d 867 29
Nereide, The (1815) 9 Cranch (13 U.S.) 388 20
New Orleans v. de Armas (1835) 9 Pet. (34 U.S.) 224 29
Paquete Habano, The (1900) 175 U.S. 677 20
Peggy, The (1802) 1 Cranch (5 U.S.) 103 29
Society v. New Haven (1823) 8 Wheat. (21 U.S.) 464 ..... 29, 31
Strother v. Lucas (1838) 12 Pet. (37 U.S.) 410 ..... 28, 31
U. S. v. Apalachian Electric Power Co. (1940)
311 U.S. 377 21
U. S. v. Commodore Park (1945) 324 U.S. 386 22
U. S. v. 43 Gallons of Whiskey (1876) 93 U.S. 188 29
U. S. v. Gerlach Live Stock Co. (1950) 339 U.S. 725 20
U. S. v. Percheman (1833) 8 Pet. (33 U.S.) 51 ..... 11, 29
U. S. v. Rauscher (1886) 119 U.S. 407 ..... 28, 29, 30
U. S. v. Rio Grande Irrigation Co. (1899) 174 U.S. 690 ..... 20, 22
U. S. v. Willow River Power Co. (1945) 324 U.S. 499 22
United Shoe Machinery Co. v. Duplessis Shoe Machinery
Co. (1st Cir., 1907) 155 Fed. 842 ..... 28, 29
Warren v. U. S. (1949) 179 F. 2d 919 29

OFFICIAL NOTES, OPINIONS AND RECORDS

Congressional Record, 79th Congress, 1st Session,
Vol. 91, parts 2 and 3 ..... Appendix VI
Hearings, Senate Foreign Relations Committee, 79th
Congress, 1st Session, On U. S.-Mexico Water
Treaty (in five parts, G.P.O. No. 68368, 1-5) ..... Appendix IV
Letter of Transmittal, Secretary of State to Pres-
ident, U. S.-Mexico Water Treaty and Protocol
(G.P.O. No. 94318-44-1) ..... Appendix III

Report of Majority of Senate Foreign Relations Committee on Treaty (G.P.O. No. 70520) ..... Appendix V
30 Op. Att. Gen. 217 18

TEXTS, PERIODICALS AND DICTIONARIES

American Bar Association J., Volumes 30, 31 27
Hackworth, Digest of International Law 18, 31
Levi, "Law Making Treaties," 28 Minn. L. R. 247 13
Moore, International Law Digest 13
Ray, Law and Practice Governing the Distribution of Water from International Streams (1933, unpublished treatise, University of Texas Library) 13
Smith, Economic Uses of International Waters (London, 1931) 13
White and Wilson, "The Flow and Underflow of Motl v. Boyd," 9 Southwestern Law J. 1, 377 9

SUPREME COURT OF THE UNITED STATES
October Term, 1955

No.

HIDALGO COUNTY WATER CNOTROL AND IMPROVEMENT DISTRICT NO. 7, et al

Petitioners,

versus

WYATT C. HEDRICK, et al

Respondents

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now come the Petitioners, Hidalgo County Water Control and Improvement District No. 7, Willacy County Water Control and Improvement District No. 1, Luther Wyrick and Marius Madsen, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above indicated case on September 30, 1955.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 43-55) is unreported. The opinion of the Court of Appeals (R. 98-113, Appendix VII, App. p. 131) is reported at 226 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was rendered on September 30, 1955 (R. 114). Petitioners' petition for rehearing was denied on November 1, 1955 (R. 119). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Petitioners were lawfully diverting and using in Texas waters of the Rio Grande below Fort Quitman prior to November 8, 1945, the effective date of the treaty between the United States and Mexico relating to the utilization of its waters. These petitioners invoke the provisions of paragraph (b) of Article 9 of that treaty against the respondents who, without first obtaining the finding, and absent the arrangement, there prescribed as a prerequisite to the commencement of new diversions or uses after the treaty's effective date, first began after that date to divert and use those waters in the United States, to the injury of petitioners. The question presented is:

Is the provision contained in the second sentence of Article 9(b) of the subject treaty a law of the United States which may be invoked against persons violating it by making diversions and uses in the United States there prohibited, at the suit of other persons who were lawfully diverting and using waters of the Rio Grande in the United States below Fort Quitman on the treaty's effective date and who are being injured by such violation?

TREATY INVOLVED

Paragraphs (a) and (b) of Article 9 of the Treaty between the United States and Mexico Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, signed at Wash-

ington February 3, 1944, and effective November 8, 1945, 56 Stat. 1219 (1945); Treaty Series 994, read as follows:

> "(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey water belonging to it.
>
> "(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information."

Paragraph (d) of said Article 9 reads as follows:

> "(d) The Commission shall have the power to authorize either country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be replaced at some other point on the river."

The resolution of the United States Senate advising and consenting to the ratification of the treaty and paragraph (c) of the understandings included therein read as follows:

> "RESOLVED (TWO-THIRDS OF THE SENATORS PRESENT CONCURRING THEREIN), That the Senate advise and consent to the ratification of Executive A, Seventy-eighth Congress, second session, a treaty between the United States of America and the United Mexican States, signed at

Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, second session, a protocol, signed at Washington on November 14, 1944, supplementary to the treaty, subject to the following understandings, and that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty:

. . . . . .

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States."

The full text of the treaty is set out as Appendix I to this brief (Appendices pp. 1 *et seq.*), and the full text of the Senate resolution is set out as Appendix II (Appendices pp. 41 *et seq.*).

STATEMENT OF THE CASE

Parties will hereafter be designated as in the trial court, where the petitioners were plaintiffs and the respondents were defendants.

The plaintiffs are two Texas citizens and two water control and improvement districts, political subdivisions of the State of Texas created to irrigate the lands within their boundaries. These four plaintiffs instituted this suit in the United States District Court for the Southern District of Texas against the several defendants who are individual and corporate owners of lands in Texas near the Rio Grande (R. 7-8, 15).

The complaint states the following facts:

The plaintiff districts had lawfully diverted waters of the Rio Grande for the irrigation of lands within their boundaries from long prior to November 8, 1945, until the time this suit was instituted, and the individual plaintiffs had lawfully used the waters of the Rio Grande to irrigate their lands on and for years prior to November 8, 1945, and until this suit was instituted (R. 13).

At the time of the institution of the suit, the United States Section of the International Boundary and Water Commission had made no finding of availability of waters of the United States' share, as prescribed in paragraph (b) of Article 9 of the treaty, and no agreement such as is described in paragraph (d) of Article 9 of the treaty had been made by the Commission (R. 14).

The several defendants, who are the owners of or tenants on lands upstream of the plaintiffs' lands first began at various times after November 8, 1945, to divert waters of the Rio Grande below Fort Quitman to irrigate their lands which had not theretofore been irrigated (R. 15-19). There was insufficient water within the United States' share of the Rio Grande's waters to satisfy uses existing prior to November 8, 1945, and the defendants' unauthorized diversions have greatly decreased the quantity of water available to the plaintiffs, so that there has been insufficient water within the United States' share to meet the plaintiffs' reasonable demands. Plaintiffs are being damaged by the defendants' diversions, and they have no adequate remedy at law (R. 14, 19-20).

The plaintiffs pray that the defendants be permanently enjoined from diverting or using waters of the Rio Grande below Fort Quitman until such time as there has been such a finding or agreement as is prescribed in paragraph (b) of Article 9 of the treaty. Plaintiffs also allege that a controversy exists between the parties with respect to whether the treaty provision invoked

is domestic law prohibiting new diversions of water of the Rio Grande absent the prescribed finding or agreement and pray for declaratory judgment that said provision does have that effect (R. 20-22).

Jurisdiction of the district court is claimed under Acts June 25, 1948, Ch. 646, 62 Stats. 930 (28 U.S.C.A. Sec. 1331) because the plaintiffs' cause arises under the treaty provision which plaintiffs invoke, and the amount in controversy, exclusive of interest and costs, is in excess of $3,000.00 (R. 9).

The defendants moved that the suit be dismissed (1) for want of jurisdiction and (2) for failure to state a cause of action upon which relief could be granted. These motions state, in substance, that the defendants are riparian owners having, in the states' view, vested rights to divert waters of the Rio Grande not subject to being impaired by treaty, that the treaty was not intended to inhibit the exercise of those rights, and that the Senates' resolution of advice and consent to the ratification of the treaty nullified that effect of the treaty, if it was so intended (R. 22-43).

The district court sustained both motions and dismissed the cause (R. 56). Its memorandum opinion (R. 43) is unreported.

The Court of Appeals for the Fifth Circuit affirmed the order of dismissal, holding that although federal jurisdiction did attach, the complaint stated no cause of action (R. 98, App. pp. 131-144).

We wish particularly to point out this inaccuracy in the Court of Appeals' opinion: "Since the plaintiffs insist that their asserted priority of right to divert and use waters of the Rio Grande arises from the treaty, it necessarily follows that under the plaintiffs' theory the rights of the Defendants would be paramount in the absence of the treaty" (R. 107, App. pp. 138-139). Of course, this does not at all follow. By this suit we invoke only the rule of

Article 9(b). The complaint does not state the nature of the plaintiffs' rights to divert and use waters of the Rio Grande or of the defendants' claimed rights. We simply contend that, absent the finding or agreement prescribed in Article 9(b), new post-treaty diversions and uses are prohibited, and that this provision is a law of the United States which plaintiffs properly invoke as a rule of court. By their motions to dismiss, the defendants allege that they are riparian proprietors and that the plaintiffs are appropriators (R. 29). This does not appear from the complaint, but the Court of Appeals found it to be true (R. 105, App. p. 137). We do not consider the error of the Court of Appeals in thus judging the sufficiency of the complaint by allegations of the motion to be sufficiently important to command the attention of this Court, but we point it out to clarify our position.

REASONS FOR GRANTING WRIT

This is the first case that has arisen under the 1945 U.S.-Mexico water treaty.

The question involved is an important one of federal law that has not been settled, and should be settled, by this Court. It is of vital importance to the economy of a highly developed and populous area of the Lower Rio Grande basin in Texas which has been built upon, and largely rests upon, long established beneficial uses of water of the Rio Grande. These uses consist principally of the irrigation of some 500,000 acres of land in the Counties of Hidalgo, Cameron and Willacy, Texas, and the domestic, municipal and industrial uses by a population of some 250,000 in that area. The decision of the question presented also affects the ability of the U. S. to honor its treaty commitment.

Further, this is the first case in which this court has been called upon to decide whether a treaty between the U. S. and a neighboring nation may, in addition to dividing the waters of an

international stream between the two countries, impose conditions and limitations upon the exercise of claimed rights to the use of the water of the stream by intending water users within the countries.

Designation of Errors

As we understand the opinion of the Court of Appeals, it holds that Article 9(b) means simply that the laws of Texas shall govern in all questions with respect to whether a given diversion of the waters of the Rio Grande is permissible and that Article 9(b) prescribed no rule which may be invoked by Plaintiffs (R. 110, App. p. 141) because:

1. "Countries" as used in Article 9(b) means "nations" (R. 109-110, App. p. 141), and in this nation the states make the laws of real property. (R. 110-111, App. pp. 141-142). These include the laws regulating the use of waters of international streams, because the courts of Texas classify riparian rights as incorporeal hereditaments (R. 107, App. p. 139).

2. Article 9(b) would be invalid if taken as diminishing defendants' riparian rights; hence such a construction is to be avoided (R. 107-109, App. pp. 139-140).

3. Paragraph (c) of the Senate's resolution makes it clear that no such construction was intended (R. 112, App. p. 143).

On the basis of these conclusions, the court affirmed the order of the district court dismissing the suit for failure to state a cause of action.

We have no quarrel with the general proposition that states make the law governing real property within their limits. But the holdings and the other supporting conclusions were erroneous, as

was the affirmance of the order of dismissal.

Plaintiffs Contentions

Plaintiffs contend that:

(1) The second sentence of Article 9(b) prohibits the commencement after the treaty's effective date of diversions and uses of waters of the Lower Rio Grande, regardless of who may make them, unless the prescribed finding or agreement has been made;

(2) This provision is valid;

(3) Its meaning was not altered by the Senate resolution, and

(4) This provision is a law of the United States which the Plaintiffs, being injured by its violation, may invoke as rule of decision in the courts of the United States.

Plaintiffs do not contend that Article 9(b) creates any "priority." It simply provides the single inhibition on new diversions and uses, and Plaintiffs rely on that provision alone.[1]

ARTICLE 9(b) PROHIBITS THE COMMENCEMENT OF NEW, POST-TREATY DATE DIVERSIONS AND USES UNTIL THE PRESCRIBED FINDING OR AGREEMENT HAS BEEN MADE

Article 9(b) reads:

"Either of the two countries may, at any point on the

[1] No doctrine of Texas water law is urged by plaintiffs, but both courts below have adverted to the chaos in Texas water law circles (R. 53, 107; Appendix VII, App. p. 139). For an explanation of some reasons for the confusion, see White and Wilson, "The Flow and Underflow of Motl v. Boyd," 9 Southwestern Law Journal 1, 377. The complaint in this case asserts, as does our petition here, that the issue is the effect and validity of the treaty provision invoked.

main channel of the river from Fort Quitman, Texas, to the Gulf of Mexico, divert and use the water belonging to it and may for this purpose construct any necessary works. However, no such diversion or use, not existing on the date this Treaty enters into force, shall be permitted in either country, nor shall works be constructed for such purpose, until the Section of the Commission in whose country the diversion or use is proposed has made a finding that the water necessary for such diversion or use is available from the share of that country, unless the Commission has agreed to a greater diversion or use as provided by paragraph (d) of this Article. The proposed use and the plans for the diversion works to be constructed in connection therewith shall be previously made known to the Commission for its information."

This provision prohibits, by its second sentence, the commencement after the treaty's effective date (Nov. 8, 1945) of new diversions and uses of the waters of the Rio Grande below Fort Quitman, until the prescribed finding or agreement has been made. No argument can make that clearer.[2]

---

[2] The opinion of the court of appeals (R. 109-110, Appendix VII, App. p. 141) could be taken to mean that only governmental diversions are inhibited by Article 9(b), since "no *such* diversions or uses" in the second sentence refers back to the diversions and uses by "countries" mentioned in the first sentence, and since the court of appeals equates "countries" with "the two nations, the United States and Mexico" (meaning federal governments?). While we no not think this was what the court below meant, the treaty's uses of "Governments" and "countries" refutes the idea. Where a governmental obligation is undertaken, the treaty uses the word "Government." "Country" is used to include the land and people governed. Thus the *Governments* undertake to:

- settle disputes to which the observance and execution of the treaty give rise (Art. 2, second paragraph)
- bear expenses (Art. 2, seventh paragraph)
- make agreements (Art. 3, last paragraph)
- construct works (Art. 5, first paragraph)
- approve the damsites, plans for dam construction, construction dates, and bear construction and maintenance costs (Art. 5)
- receive reports from the Commission (Arts. 6 and 7)
- construct works (Arts. 6 and 7)
- operate and pay for the construction and maintenance of hydroelectric plants (Art. 7)
- construct works (Art. 12, first sentence)

(Continued on Page 11)

Article 9(b) Was Deliberately Intended So To Inhibit New Diversions

Article 9(b) is clear and can be construed not to prohibit new diversions absent the prescribed finding or agreement only by a construction that does violence to its language. But if the intent of the treaty makers were important, the same result would follow.

Mr. Frank Clayton, General Counsel for the United States Section of the International Boundary Commission which represented the United States in the treaty negotiations, testified before the Senate Foreign Relations Committee, after quoting Article 9(b) at length:

> "The effect of this provision is that all existing diversions from the river and uses from the river in both countries are protected under the treaty. If somebody wants to divert

---

The *countries*, on the other hand:
- have works located within their limits (Art. 2, fifth paragraph)
- have waters allocated to them (Art. 4, first sentence)
- own the water (Art. 8, sub-paragraphs (b), (c) and (f)
- use the Rio Grande to convey water (Art. 9(a))
- make consumptive uses of water (Art. 9(c))
- divert and use water (Art. 9(d) and (c))
- experience droughts (Art. 9(f))
- have the right to divert (Art. 9(g))

and so on. A clear illustration is:

"The two *Governments* recognize that both *countries* have a common interest in the conservation and storage of waters . . . " (Art. 8, first sentence, emphasis added). A reading of the entire treaty shows that the distinction was scrupulously observed.

Further, the Mexican counterpart of the second sentence of Article 9(b) reads:

"Sin embargo, no podrá hacerse ninguna derivacion o uso en cualquiera de los dos países, fuera de los existentes en la fecha en que entre en vigor este Tratado, ni construirse ningunas obras con aquel fin, hasta . . . "

This translates,

"However, no diversion or use may be made in either of the two countries, outside of the ones existing on the date this treaty enters into force, until . . . "

No word corresponding to the "such" in the English counterpart is used in the Mexican counterpart. Hence "no *such* diversion or use" was thought by the treaty makers to mean "no diversion or use." Both counterparts are the law of the land and, in case of doubt, both should be looked to for the intended meaning. U. S. v. Percheman (1833) 8 Pet. (33 U.S.) 51, per Marshall, C.J.

some more water from the stream—and we will assume that it is in the United States—the only thing the American section is called upon to do is to determine whether there is impounded in the reservoirs along the Rio Grande, or flowing in the river, enough water to satisfy that use within the share of the United States, a matter of mathematical determination that, under the treaty, has got to be kept up from day to day, week to week, and month to month. But where that diversion is to be and where the use is to be is solely a matter for State authorities under State law." [3]

The provision was said to mean the same thing by the memorandum filed by the Department of State with the Senate Foreign Relations Committee,[4] by the majority report of that committee[5] and by the witnesses who had anything to say on the subject.[6] Nobody connected with the negotiation or ratification of the treaty ever suggested it had any other, or less, meaning.

This provision, which leaves existing diversions and uses unfettered while restricting the commencement of new diversions and uses, had a dual purpose: The restriction of the countries' diversions to their respective shares and the protection of existing diversions and uses. We shall discuss the necessity and propriety of the provision, so far as it is necessary to accomplish the first purpose, under our argument relating to validity, below. Here we shall only point out that Article 9(b) was understood and intended to protect existing uses.

The Allocation of the Waters Was Made on the Basis of Existing Uses

It is important to notice here the basis for the division of the

---

[3] Appendix IV (g), App. pp. 59-60.

[4] Appendix IV (s), App. p. 99.

[5] Appendix V, App. p. 107.

[6] Appendix IV (h), App. pp. 60-62; IV (k), App. pp. 90-91; IV (m), App. pp. 92-93.

waters between the two countries. The waters of the Rio Grande—and of the Colorado, incidentally—were allotted to the two countries on the basis of the rule, recognized by long usage and in many treaties, that diversions and uses of the waters of an international stream, existing on the date of the division of such waters by treaty, are entitled to be protected. This rule has come through long usage to be recognized as a controlling principle in the settlement of disputes over international waters[7] and hence a principle of international law or comity.[8]

The State Department and the American Section of the International Boundary and Water Commission repeatedly gave this as the rationale of the division of the waters,[9] as did Texas' official representative testifying in the Committee hearings.[10]

The majority report of the Senate Foreign Relations Committee, recommending the treaty favorably, stated, "There are a number of treaties among the civilized nations of the world relating to the distribution of waters of international streams. The United States is a party to two of them. In all of these treaties of which this committee is aware, existing uses at the time of the negotiations in the lower riparian state have been protected . . . " This report was adopted by an 18 to 4 vote.[11]

---

[7] See brief on treaty precedents filed with the Senate Foreign Relations Committee by the International Boundary Commission, Appendix IV (j), App. pp. 63-90. See also Smith, Economic Uses of International Waters (London, 1931), 42, 145; Ray, Law and Practice in the Distribution of Waters of International Streams (1933, unpublished treatise, University of Texas library, copy of which will be furnished the court or adverse counsel on request).

[8] The Antelope (1825) 10 Wheat. (23 U.S.) 66, 120-121; 1 Moore, International Law Digest 7; Levi, "Law Making Treaties" (1944), 28 Minnesota Law Review 247.

[9] Appendix IV (c)-(e), App. pp. 55-59; IV (g), App. pp. 59-60; IV (i), App. p. 114; IV (g) and (h), App. pp. 95-98.

[10] Appendix IV (p), App. p. 94. See also the report of the "Committee of Seven," Appendix IV (e), App. pp. 91-93.

[11] Appendix V, App. pp. 103-104, 109.

The Senate so understood the basis of the allocation of waters by the treaty.[12]

The application of this rule resulted in the United States' being allotted much of the waters that arise in Mexico in addition to all of the flow of measured American tributaries and half of the unmeasured inflows. As Commissioner Lawson explained to the Senate Foreign Relations Committee:

> "Although, as I said before, approximately 70 percent of the natural flow of the Rio Grande is supplied by Mexican tributaries, the effect of the pending treaty will be to guarantee to the United States, on the basis of established beneficial uses, approximately one-half of the natural flow, plus about 60 per cent of all floodwaters which can be impounded in the contemplated international reservoirs, that is approximately 2,000,000 acre-feet, less chargeable losses, or sufficient water to make possible the irrigation of about 400,000 acres of land in the United States, in addition to the 500,000 acres now under irrigation." [13]

Article 9(b) Was Intended To Protect Existing Diversions and Uses

Hence, the existing diversions in this country furnished the basis for the claim of the United States to more than half of the flow of the Rio Grande, though Mexican tributaries account for seventy per cent of that flow. It was the often expressed, deliberate intent of the treaty makers that these diversions and uses be protected by Article 9(b).

Thus the general counsel for the United States Section of the

---

[12] Appendix VI (a) and (b), App. p. 110; VI (i) and (j), App. pp. 114-115.

[13] Appendix IV (e), App. pp. 57-59, last paragraph. See also Appendix IV (c), App. pp. 55-56; IV (p), App. p. 94; IV (r), App. pp. 96-98. And see Appendix III, App. p. 47, for a short analysis of the allocation of waters.

Commission testified:

> "The effect of (Article 9(b)) is that all existing diversions from the river and uses from the river in both countries are protected by the treaty . . . "[14]

The Department of State so understood and intended the provision, as is reflected by its memorandum filed with the committee:

> "Present existing uses in both countries are fully protected by the treaty. With respect to those to be made in the future, the sole province of the American Commissioner is to determine that, at the times and places where the diversions are proposed, there is sufficient water within the allocated share of the United States to satisfy the proposed use."[15]

The Senate Foreign Relations Committee's majority report, recommending that the Senate advise and consent to the ratification of the treaty, contains this statement relating to the portion of the treaty which has to do with the Rio Grande:

> "Existing uses are fully protected. As to any future uses, the sole function of the United States section is to determine that, at the time and place where the new diversion is proposed, there is sufficient water in the reservoirs or the river."[16]

This report was approved by a vote of 18-4.

The meaning of Article 9(b) was never discussed in the Senate debates on ratification. The question was by then closed

---

[14] Appendix IV (g), App. p. 59-60.
[15] Appendix IV (s), App. p. 99.
[16] Appendix V, at App. p. 107.

to everyone's satisfaction.[17]

The Intent To Protect Existing Uses Is Evident Elsewhere in the Treaty Itself

Moreover, this intent to protect existing uses is evident elsewhere in the treaty itself. Article 26 of the treaty provides:

> "During a period of eight years from the date of the entry in force of this Treaty, or until the beginning of operation of the lowest major international reservoir on the Rio Grande (Rio Bravo), should it be placed in operation prior to the expiration of said period, Mexico will cooperate with the United States to relieve, in times of drought, any lack of water *needed to irrigate the lands now under irrigation in the Lower Rio Grande Valley* in the United States . . . Mexico shall release . . . excess water that does not in the opinion of the Mexican Section have to be stored and that may be needed *for the irrigation of lands which were under irrigation during the year 1943 in the Lower Rio Grande Valley in the United States.*" (Emphasis added.)

Article 5 of the treaty provides for the construction of dams to control the Rio Grande's flow *"in a way to ensure the continuance of existing uses* and the development of the greatest number of feasible projects . . . " (Emphasis added.)

ARTICLE 9(b) IS VALID

As we understand the opinion of the Court of Appeals, it states that Article 9(b) cannot be taken as a domestic law affecting the Defendants' asserted rights to divert waters of the Rio Grande because water law matters are within the province of the states

---

[17] Even Texans were satisfied. Texas' Attorney General Grover Sellers testified: "Under articles 5 and 9 of the treaty, the existing diversions and uses along the Rio Grande in both countries are fully protected." Appendix IV (m), App. p. 92. See also Appendix IV (n), App. p. 93.

and because Article 9(b) would, if so construed, abridge vested rights of the Defendants. We shall deal with these questions in that order.

Some Method of Enforcing the Allocation Was Necessary To Effect the Purposes of the Treaty

The treaty allocates the waters of the Lower Rio Grande between the two countries according to the formula set out in Article 4. This agreed division necessarily carried with it the obligation of the government to see that diversions in this country do not encroach on the share alloted to Mexico. This is an obligation of the United States of America, not of the State of Texas. It follows that the government of the United States must be in a position to enforce the allocation.

The reach of the Rio Grande involved in this treaty is 1200 miles long.[18] At the time the treaty was negotiated, an ever-expanding population was taxing the available flow.[19] As is here alleged, the supply is still inadequate to supply both the pre-treaty date uses and the defendants' uses (R. 20). Some method of restricting these diversions to the United States' share had to be made.[20]

The possibilities open to the United States were these:

1. It could enforce the system facetiously known along the Rio Grande as our system of "higherority": The highest upstream gets water. That is, the United States section could cut off all pumps below the point where the American water runs out, which

---

[18] Appendix IV (e), App. p. 58.

[19] Appendix IV (a), App. p. 52; IV (b), App. p. 55.

[20] Note the solution suggested by the Court of Appeals: All the riparians on this 1200 mile reach are entitled to begin irrigation at any time, and "the Texas water laws and decisions are in hopeless confusion" (R. 107, Appendix VII, App. p. 139). But Texas laws control (R. 110-111, Appendix VII, App. pp. 141-142).

would vary daily.

2. It could authorize some official of this government to act as a water master and to direct who should divert, and when and how much.

3. It could write into the treaty some standard by which the right to make diversions would be ascertained. This latter course it took, and the standard adopted was this: Existing diversions may continue; new diversions may be begun only when water is available for them.

It is difficult to imagine how the United States could have injected itself less into the field of controlling diversions if it was to honor the treaty's allocation of waters.

The propriety of such a standard is pointed up by the situation which arose following a 1909 treaty between the United States and Great Britain apportioning the waters of the Niagara between Canada and the United States. After American diversions exceeding the flow alloted to the United States had occurred, the Secretary of State inquired whether he might enforce the allocation in the United States. The then Acting Attorney General advised that the provision alloting the water of itself limited American diversions, and that this provision "can be enforced by injunction or other proceedings in a court of law" [21] In 1919, by another opinion, the Attorney General advised the President, with respect to the same treaty, "You may invoke the aid of the courts . . . " in order to enforce the allocation of waters.[22]

Before the President or anyone else could enforce such a treaty, he would have to decide on a standard by which it should

---

[21] 5 Hackworth, Digest of International Law 176.
[22] 30 Op. Att. Gen. 217.

be determined which diversions or uses should be curtailed. It would be absurd to argue that a treaty may delegate the duty to make such a standard but that the treaty itself may not provide that standard.

The Standard Adopted Was Justified

As we have above demonstrated, the treaty divides the waters of the Rio Grande between the two countries on the basis of the principle that existing uses, as of the date of the settlement between nations of the distribution of the waters of an international stream, are entitled to be protected. At the time that the treaty was negotiated, Mexican uses were burgeoning and threatened to deplete drastically the flow of the lower Rio Grande, and Texas was impotent to prevent it.[23]

In this situation the treaty was negotiated and Article 9(b) was drafted, inserted in the treaty and ratified without criticism. Its effect, if it is enforced as it is literally drawn, will be to afford a measure of protection to those users whose industry and investment acquired for the United States the right to the share of water allotted it by the treaty. It is perfectly appropriate for the United States, when exercising its treaty power, to define those of its residents who are objects of the treaty's protection. It is especially appropriate that this class be defined as those whose activity and investment have acquired for the United States the right recognized by the treaty.

Stated conversely, the appellees are in the position of saying that even though the plaintiffs and other pre-treaty users ripened the claim to the United States' share of the flow under the stated rule of international practice, the defendants have an immutable

---

[23] United States Constitution, Article I, Section 10. See Senator Connally's statement of the situation. Appendix VI (o), App. p. 111.

right to pre-empt that flow by the application of a different rule claimed to exist under state law.

> "Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger."[24]

Such a contention presupposes that international law is ineffectual as domestic law. Rather, international law is a part of the domestic law of the United States.[25]

Riparian Rights To Waters For Irrigation Are Not Property Rights Protected By the Due Process Clause of the Fourteenth Amendment

It is clear that there is no federal constitutional objection to the qualification, or even the abolition, by a state of riparian rights theretofore regarded by the state as vested property rights.

> " . . . every state is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise." [26]

In *U. S. vs. Gerlach Live Stock Co.*[27] the Supreme Court had occasion to review the water law of California because the Act of Congress there involved had adopted the state's law as the measure of federal liability for the water rights taken by a federal reclamation project. The Court said:

> "Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger. The shore proprietor could

---

[24] Justice Jackson in U. S. vs. Gerlach Livestock Co. (1950) 339 U.S. 725.

[25] The Nereide (1815) 9 Cranch (13 U.S.) 388, 423; The Paquete Habano (1900) 175 U. S. 677, 700; See U.S.C.A. Title 18, Secs. 1651, 3058; Title 28, Secs. 1251, 1350.

[26] Connecticut v. Massachusetts (1931) 282 U.S. 660, 670. To the same effect, United States v. Rio Grande Irr. Co. (1899) 174 U.S. 690, 792.

[27] (1950) 339 U.S. 725.

enforce by injunction his bare technical right to have the natural flow of the stream, even if he was getting no substantial benefit from it. The canine element in the doctrine is abolished. (By the Amendment of California's Constitution next quoted:)

> "'The right to water, or to the use of flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served' . . . This limitation is not transgressed by the awards in question which only compensate for the loss of actual beneficial use . . ."

Thus the court treats as compensable only the "loss of actual beneficial use," because California had so qualified the rights of riparians, and because the state standard had been adopted by the Act of Congress authorizing the project as the measure of compensable rights. The "rights" taken were treated as compensable only because Congress had so directed.

If riparian rights were such property rights as are protected by the due process clause of the Fourteenth Amendment, the states could not abridge them, as they clearly may.

Water Rights In Navigable Streams Are Not Property Protected By the Fifth Amendment

This Court has several times had occasion to examine the contention that a water right, vested in the view of the state, could not be impaired by Congress in its exercise of the commerce power.

In *U. S. v. Appalachian Electric Power Company,*[28] the defendant had acquired "as complete a right to the use of the ri-

[28] (1940) 311 U.S. 377.

parian lands, the water and river bed as can be obtained under state law." But the defendant declined to comply with such of the regulations, not relating to navigation, as the Federal Power Commission had prescribed. The defendant was enjoined from exercising its claimed water right. The court said:

> "The Federal Government has dominion over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."

In *U. S. v. Willow River Power Company*[29] the government had constructed a dam which interfered with the plaintiffs' claimed right as a riparian owner to the fall of the river for power generation purposes. The court said:

> " . . . The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute 'property rights' in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption." [30]

Until the treaty here in question dedicated its waters to other uses (see the preamble of the treaty, Appendix, p. 1) the lower Rio Grande was a federal and an international navigable stream.[31] The state could confer no vested right *in rem* to its waters.

---

[29] (1945) 324 U.S. 499.

[30] See also Gibson v. U. S. (1897) 166 U.S. 269, and U.S. v. Commodore Park (1945) 324 U.S. 386.

[31] U.S. v. Rio Grande Irrigation Co. (1899) 174 U.S. 690; Treaty of Guadalupe Hidalgo (1848) 9 Stat. 922, Treaty Series 207, Article VII.

An Interstate Compact May Properly Diminish a Water Right Vested In the State's View

On an interstate level, the question here posed was decided in *Hinderlider v. LaPlata, etc., Co.*[32]

Here a compact between Colorado and New Mexico had apportioned the waters of the LaPlata River between the two states. Prior to this compact, the plaintiff irrigation company had obtained a final adjudication by the state courts that it was entitled to a continuous diversion of 39½ second feet, subject only to one prior appropriation of 19 second feet. The Colorado Supreme Court held that the plaintiff company's right was a vested right such as could not be qualified or diminished by a compact and enjoined the state engineer from enforcing the compact against the plaintiff.

The case went by writ of certiorari to this court, which assumed that the plaintiffs' water right was as good a vested right as it was within the power of Colorado to grant. But, said the court, a compact is, granted Congressional consent, the equivalent of a treaty between nations. And such a compact, properly negotiated, bound the Colorado users and qualified their rights, however good and immutable in the state's view.

Article 9(b) is valid. The propriety of the treaty's allocation of the waters being unquestioned, the propriety of Article 9(b) follows.

THE SENATE RESOLUTION OF ADVICE AND CONSENT DID NOT ALTER THE MEANING OF ARTICLE 9(b)

The Senate advised ratification of the treaty with the "under-

[32] (1938) 304 U.S. 92.

standing" that "the true meaning of the Treaty," was, *inter alia*:

> "(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States." [33]

This understanding does not say that nothing in the treaty shall be construed as affecting anyone's right to divert waters. Rather, it says that the specified officers shall not be authorized to alter or control distribution. The treaty, not the officers designated, makes the rule of law for which plaintiffs contend.

If paragraph (c) of the Senate resolution had abrogated Article 9(b), then the United States government would be obligated to restrict the total diversions in the United States, but none of the officials who have anything to do with administering the treaty could participate in making the restriction, and no criterion for the action would be indicated by the treaty. That is the logical result of the construction put on the treaty by the courts below. Both held that Article 9(b) had no effect as domestic law, but both admitted that each nation must limit the total diversions and uses in their countries (R. 52, 110, App. p. 141). Limiting total diversions in this country requires a decision as to which diversions shall be curtailed or prohibited. The quoted provision of the Senate resolution makes it clear that the Secretary of State and his subordinates shall not make such a decision. Therefore, if the only criterion in the treaty were eliminated by judicial exorcision, the President or some of his subordinates (other than those

[33] Appendix II, App. pp. 41, 43.

in the Department of State or the Commission) would have to act directly in the matter—without any standard provided by law. The only alternative is the national dishonor of failing to enforce the allocation of waters at all and the resultant international ill will.[34]

If the opinions of the courts below were thought to strike blows for "state's rights," they were so considered only because those courts failed to grasp the idea that either the treaty itself, or the executive of this country unaided by anything in the treaty, must somewhere draw a line on the ever-increasing diversions in this country.

The Language of the Resolution Is Not So Calculated

Further, the Senate resolution does not alter the meaning of Article 9(b), because the language is not calculated to abrogate a plain provision of the treaty. The Senate resolution denominates paragraph (c) an understanding of the true meaning of the treaty. One cannot *understand* Article 9(b) not to prohibit new post-treaty diversions and uses absent the prescribed finding or agreement.

Again, paragraph (c) of the resolution states that the treaty shall not be "construed as authorizing" the designated officers to alter or control the distribution of waters in the states. Article 9(b) makes no grant of power. It simply gives the United States Section of the Commission the ministerial duty of ascertaining if and when water is available for new uses.

In short, the Senate resolution is not so worded as to abro-

[34] We discard the possibility of leaving to Texas the duty of enforcing a treaty obligation of the United States, and we trust that no argument is needed in respect to this.

gate Article 9(b). Rather, it provides simply that the designated officers shall not, by administrative action, set themselves up as water masters for the rivers involved. And no alteration of the meaning of Article 9(b) which could be wrought by the Senate resolution, short of outright abrogation of the former, suggests itself to us. So far as we can see, none suggested itself to the courts below.

Thus paragraph (c) of the Senate resolution did not repeal the provision of the second sentence of Article 9(b). Rather, it prevents the exercise, by the officers charged with the duty of administering the treaty, of the power which the executive of the United States must seize if the inhibition on new uses provided by Article 9(b) is not enforced.

The Senate Resolution Was Not Intended To Affect Article 9(b)

If, however, it is necessary to look to the intent of the Senate as revealed in the record of its debates, it becomes plain that the Senate did not intend to change the meaning of Article 9(b).

Paragraph (c) of the Senate resolution was included solely to allay the fears of some Senators that great legislative and judicial powers could be arrogated to the State Department, the American Commissioner, or the American Section, so that they could generally control the use of waters in the several States. The understandings were added at the insistence, largely, of Senators whose states are in the Colorado basin. Article 9(b) applies only to waters of the Rio Grande and was not criticized.[35]

---

[35] Numerous statements to the effect that no one objected to any part of the treaty so far as it applied to the Rio Grande were made on the Senate floor and were unchallenged. See Appendix VI (c) and (d), App. p. 111-112; VI (t), App. p. 121. Article 9(b) applies only to the Rio Grande, but some senators from states bordering on the Colorado objected strenuously that the treaty would give the Commission plenary authority to dictate who should divert, and how much and when. See Appendix VI (g), App. p. 113; VI (l), App. p. 116; VI (o), App. p. 119; VI (y), App. p. 126; VI (aa) and (bb), App. pp. 127-128.

Article 9(b) of the treaty is a provision of substantive law, and an explicit provision of the treaty. The Senate did not intend by its "understandings" to abrogate it. As Senator Connally explained on the Senate floor, "Without in any way changing the treaty, we propose to add these interpretative resolutions, saying that 'so and so', according to our view, means 'so and so' with the hope of satisfying Senators who have complained particularly about the language."[36] In short, the office of an "understanding" is to clear up an ambiguity, not to abrogate a plain provision.[37]

Even though the treaty itself and not the United States Section prescribes the inhibition on new uses and the United States Section is given only the ministerial function of ascertaining when water is available for new uses, it may be insisted that the United States Section could "indirectly" control distribution in Texas by withholding a finding of availability. The words "directly or indirectly" were added to paragraph (c) because some Senators from western states feared that the American Commissioner would indirectly interfere with state water law administration by obtaining the intervention of some other federal agency such as the Bureau of Reclamation.[38] No criticism of the ministerial function delegated to the American Section by Article 9(b) entered into this discussion.

Thus the very seizure of power which the addition of the words "directly or indirectly" was intended to prevent will be necessitated

---

[36] Appendix VI (s), App. p. 121. See also Senator Connally's statement, "The language (of the understandings) will no doubt be changed in such a way as to satisfy those senators. I am willing to agree to the changes so long as they do not violate any of the explicit terms of the treaty." Appendix VI (r), App. p. 121.

[37] The American Bar Association's criticism of the treaty, which largely prompted the inclusion of paragraphs (b) and (c) in the Senate resolution, specifically said that that association had no quarrel with the merits of the treaty but only with the grant of excessive powers. Appendix VI (u), App. pp. 121-123; see 30 A.B.A.J. 661 and 31 A.B.A.J. 284.

[38] Appendix VI (w)-(dd), App. pp. 125-129.

by the construction put upon the treaty by the courts below.

In short, paragraph (c) of the Senate resolution did not divest the United States Section of the Commission of the ministerial function of making the findings there prescribed, nor did it abrogate Article 9(b). Rather, it makes clear that the officers named in paragraph (c) shall neither arrogate to themselves, nor procure others to exercise, judicial or legislative powers respecting the distribution of the waters allocated to the United States under the treaty.

PLAINTIFFS MAY INVOKE ARTICLE 9(b) AS A RULE OF DECISION

There can be no doubt that Article 9(b) is self-executing. It is expressed as being effective from the date the treaty enters into force.[39] It prescribes a rule complete on its face,[40] and no legislative action is necessary to effect its object.[41]

Plaintiffs May Invoke Article 9(b), Which Was Intended To Protect Existing Uses

When self-executing, "Treaties are the law of the land and a rule of decision in every court."[42] Self-executing provisions of a treaty may be invoked as a rule of decision by the government

---

[39] Haver v. Yaker (1869) 9 Wall. (76 U.S.) 32; United Shoe Mach. Co. v. Duplessis Shoe Machinery Co. (1907) 155 Fed. 842, 845.

[40] Head Money Cases (1884) 112 U.S. 580, quoted in U. S. v. Rauscher (1886) 119 U.S. 407, 413, and in In Re Cooper (1892) 143 U. S. 472, 502. See also United Shoe Machinery Company vs. Duplessis Shoe Machinery Co., (1907) 155 Fed. 842.

[41] Indemnity Ins. Co. vs. Pan American Airways (1944) 58 F. Supp. 338, 340. See General Elec. Co. v. Robertson (1927) 21 F. 2d 214, 215-216. The treaty contains many provisions which are not self-executing. Such are all those provisions wherein the "Governments" undertake to pay costs, to study, to make further agreements, *etc.* See footnote 2, above.

[42] Strother v. Lucas (1838) 12 Pet. (37 U.S.) 410, 439.

on its own behalf,[43] ex relatio another,[44] or on behalf of others.[45] A state instrumentality may so invoke a treaty provision,[46] as may private citizens,[47] a foreign or domestic corporation,[48] or an individual alien.[49] The cases cited include criminal cases, civil forfeiture cases, and actions for damages, injunctions and recovery of realty.

But, as we understand the Court of Appeals' opinion, it held that plaintiff might not invoke Article 9(b) as a rule of domestic law because:

> " . . . If any intent had been present to create or protect or give a priority to individual property rights of one group resulting in the diminution or divestment of those of another group, the operative language would have been couched in more explicit terms" (R. 110, App. p. 141).

Of course, the language is explicit. It creates no "priorities." It simply prohibits the commencement of new diversions and uses absent the requisite ministerial finding or the agreement specified. It creates no rights to divert and use waters of the lower Rio Grande. Plaintiffs' rights to divert and use the water antedated the treaty. But enforcement of the provision on which plaintiffs rely will protect their water supply. We have above demonstrated that this was its intended effect. However, the Plaintiffs might invoke the provision as a rule of decision even if the protection which will result in its enforcement had not been (as it was) one of the motives for including Article 9(b) in the treaty.

---

[43] U. S. v. 43 Gallons of Whiskey (1876) 93 U. S. 188.
[44] The Peggy (1802) 1 Cranch (5 U.S.) 103.
[45] McCauley v. Makak Indian Tribes (1942) 128 F. 2nd 867.
[46] New Orleans v. de Armas (1835) 9 Pet. (34 U.S.) 224.
[47] U. S. v. Percheman (1833) 8 Pet. (33 U.S.) 51; U. S. v. Rauscher (1886) 119 U. S. 407; Warren v. U. S. (1949) 179 F. 2nd 919.
[48] Society v. New Haven (1823) 8 Wheat (21 U.S.) 464; United Shoe Machinery Company v. Duplessis Shoe Machinery Co. (1907) 155 Fed. 842.
[49] Geofroy v. Riggs (1890) 133 U.S. 258.

Plaintiffs Might Invoke the Treaty Provision Even If It Had Not Been Specifically Intended For Their Protection

Only once has this court seriously considered the contention that a self-executing treaty provision might not be invoked by one who would benefit therefrom, but for whose benefit the treaty was obviously not made.

This was in *U. S. v. Rauscher.*[50] Rauscher, the defendant, had been extradited pursuant to a treaty between the United States and Great Britain which provided that fugitives accused of certain enumerated crimes should be delivered up, but only upon such evidence as would justify commitment for trial in the country where the fugitive was apprehended. Rauscher was extradited upon an accusation of murdering one Janssen, but he was indicted and put to trial upon a charge of assaulting and inflicting cruel and unusual punishment on the deceased Janssen. The same occurrence was involved in the extradition charge and the indictment.

The circuit court certified this question to the Supreme Court:

> "'Second. Did or not the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the indictment, without being first afforded an opportunity to return to Great Britain?'"

The government contended that even if it should be violative of the treaty to put one on trial for an offense different from that for which he was extradited, such violation would be of concern only to the two governments, and that Rauscher could not invoke for his own protection treaty provisions not intended to protect him.

---

[50] (1886) 119 U.S. 407.

The Supreme Court decided that it would be violative of the treaty to put the defendant to trial for an offense different from that for which he was extradited, that the treaty was the law of the land, and that the defendant had a right to invoke the treaty provision as such. It answered the certified question in the affirmative, the Chief Justice dissenting.

The treaty provisions invoked by Rauscher were hardly intended for his benefit. Article 9(b) *was* intended for the benefit of pre-treaty date users, but even if this were not so, they might still properly invoke its provisions.

It is not surprising that the point has not been raised from the time of the *Rauscher* case until this. The repeated declaration of this court forecloses the question: "Treaties are the law of the land, and a rule of decision in every court." [51]

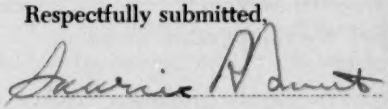
---

[51] Strother v. Lucas (1838) 12 Pet. (37 U.S.) 410, 439. See also American Insurance Company v. Canter (1828) 1 Pet (26 U.S.) 511; Society v. New Haven (1823) 8 Wheat (21 U.S.) 464. See 5 Hackworth, International Law Digest 183-4.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

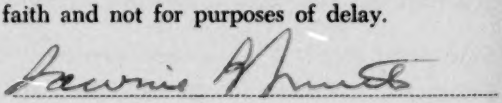


Sawnie B. Smith
P. O. Box 52
Edinburg, Texas
Attorney for Petitioners

Hill, Lochridge and King
P. O. Box 32
Mission, Texas
Of Counsel

January, 1956

I, the undersigned member of the bar of this Court, of counsel for petitioners, certify that I have this 21st day of January, 1956, deposited in the United States postoffice, with first class postage prepaid, a copy of the foregoing petition for writ of certiorari, addressed to each of the below named attorneys, who are all of the attorneys for the respondents and all of the attorneys for the Defendants in the trial court. This petition is presented in good faith and not for purposes of delay.



Mr. John A. Pope, Jr.
Rio Grande City, Texas

Messrs. Rankin, Kilgore and Cherry
P. O. Box 569
Edinburg, Texas

Mr. Osce Fristoe
104 Van Buren Street
Harlingen, Texas

Mr. Fred J. Newland
108 W. Jackson
Harlingen, Texas

Messrs. Davenport and Ransome
P. O. Box 112
Brownsville, Texas

Messrs. Mann and Byfield
P. O. Box 820
Laredo, Texas

Messrs. Cleaves and Cleaves
712 Sterling Building
Houston, Texas

Messrs. Raymond, Algee, Alvarado, Kazen and Woods
P. O. Box 681
Laredo, Texas

Mr. John E. Lyle, Jr.
2728 Agnes St.
Corpus Christi, Texas